

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

HOLLI NICEWANDER,

Plaintiff,

v.

MTC FINANCIAL, INC. dba TRUSTEE  
CORPS, *et al.*,

Defendants.

Civil No. 10cv2141-L(WMC)

**ORDER GRANTING DEFENDANTS'  
MOTIONS TO DISMISS WITH  
LEAVE TO AMEND  
[Doc. no. 18 & 29]**

In this mortgage foreclosure action Defendants OneWest Bank (“OneWest”), Federal Home Loan Mortgage Corporation (“Freddie Mac”) and Mortgage Electronic Registration Systems, Inc. (“MERS”) filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Subsequently Defendant MTC Financial, Inc. dba Trustee Corps (“Trustee Corps”) also filed a Rule 12(b)(6) motion. Plaintiff opposed both motions. For the reasons which follow, the motions are **GRANTED WITH LEAVE TO AMEND**.

Plaintiff owned the residence located at 18630 Quail Trail Drive in Jamul, California (“Property”). On or about June 19, 2007 she executed a note for \$368,000 secured by a deed of trust on the Property. (First Am. Compl. Exh. A & B.) The lender on the loan was American Mortgage Network, Inc., the trustee under the deed of trust was First American Title Insurance Company, and the beneficiary under the deed of trust, solely as nominee for the lender and its successors and assigns, was MERS. (*Id.*) On April 22, 2009 the deed of trust was assigned to

1 IndyMac Federal Bank, F.S.B. (“IndyMac”). (*Id.* Exh. F.)

2 Plaintiff claims she applied and was approved for loan modification in early 2009, but  
3 nevertheless received a notice of default. (*Id.* at 10.) She claims that while her loan  
4 modification application was pending, OneWest, as the loan servicer, would not accept her  
5 payments. (*Id.*) A Notice of Default and Election to Sell Under Deed of Trust was recorded on  
6 April 24, 2009. It was signed by Trustee Corps as agent for IndyMac. (*Id.* Exh. C.)

7 On June 15, 2009 a substitution of trustee was signed, whereby IndyMac named Trustee  
8 Corps as the successor trustee under the deed of trust. (*Id.* Exh. E.) On the same day the deed of  
9 trust was assigned to Freddie Mac. (*Id.* Exh. G.) A notice of trustee’s sale was recorded on  
10 August 6, 2009, setting the sale date for August 26, 2009. (*Id.* Exh. D.) It was signed by  
11 Trustee Corps as the successor trustee.

12 Although Plaintiff made payments after loan modification was approved, the Property  
13 was still foreclosed. (*Id.* at 28.) It was sold to Freddie Mac at a non-judicial foreclosure sale on  
14 June 7, 2010. (*Id.* Exh. H.) The trustee for the sale was Trustee Corps.

15 On August 11, 2010 Plaintiff filed a complaint in state court seeking relief from the  
16 foreclosure. Freddie Mac removed the action to this court pursuant to 12 U.S.C. Section  
17 1452(f), which provides for removal by a federal home loan mortgage corporation.

18 Plaintiff’s operative first amended complaint is based on the premise that the foreclosure  
19 was invalid for various reasons. She claims the assignments of the deed of trust and substitution  
20 of the trustee were invalid. Specifically, she contends that Freddie Mac did not acquire a  
21 security interest in the Property when the deed of trust was assigned to it because the underlying  
22 loan was securitized and as such was not properly transferred and assigned to Freddie Mac.  
23 According to Plaintiff, securitization occurs when mortgage loans become security for interests  
24 transferred to investors. In addition, Plaintiff alleges the assignments were invalid because they  
25 were not filed before the notice of default was recorded, and were not recorded until after the  
26 trustee’s sale. She also maintains the substitution of the trustee was invalid because it was not  
27 recorded before the notice of default. Finally, she asserts that the assignments were invalid  
28 because they were signed by robo-signers. In addition, she argues that the trustee’s sale was

1 invalid because the original note and the original assignments of the deed of trust were not  
 2 presented. (First Am. Compl. at 7-15; *see also id.* at 3.) The complaint is also based on the  
 3 contention that the foreclosure was wrongful because Defendants failed to comply with statutory  
 4 provisions designed to avoid foreclosure. (*Id.* at 22.) Plaintiff alleged causes of action styled as  
 5 injunctive relief [to set aside trustee's sale], cancellation of written instrument (Cal. Civ. Code §  
 6 3412) [trustee's deed upon sale], cancellation of written instrument (Cal. Civ. Code § 3412)  
 7 [deed of trust], wrongful foreclosure, violation of California Business and Professions Code  
 8 Section 17200 *et seq.* and California Penal Code Section 115.5 [false and/or fraudulently  
 9 procured documents], violation of California Business and Professions Code Section 17200 *et*  
 10 *seq.* ["fairness doctrine"], and violation of the one action rule (Cal. Code Civ. Proc. § 726).

11 Plaintiff wants to set aside the trustee's sale and recover damages, including punitive damages.

12 Defendants moved to dismiss the operative complaint pursuant to Federal Rule of Civil  
 13 Procedure 12(b)(6). A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v.*  
 14 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where the  
 15 complaint lacks a cognizable legal theory. *Shroyer v. New Cingular Wireless Serv., Inc.*, 622  
 16 F.3d 1035, 1041 (9th Cir. 2010) (internal quotation marks and citation omitted); *see Neitzke v.*  
 17 *Williams*, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the  
 18 basis of a dispositive issue of law"). Alternatively, a complaint may be dismissed where it  
 19 presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson*  
 20 *v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *see also Shroyer*, 622 F.3d at  
 21 1041. "In addition, to survive a motion to dismiss, a complaint must contain sufficient factual  
 22 matter to state a facially plausible claim to relief." *Shroyer*, 622 F.3d at 1041, citing *Ashcroft v.*  
 23 *Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009). In reviewing a motion to dismiss under Rule  
 24 12(b)(6), the court must assume the truth of all factual allegations and must construe them in the  
 25 light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,  
 26 337-38 (9th Cir. 1996). Legal conclusions need not be taken as true merely because they are  
 27 couched as factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Similarly,  
 28 "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion

1 to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

2 All relief sought by Plaintiff is based on the premise that the non-judicial foreclosure sale  
3 should be set aside because of alleged irregularities in the assignment of the deeds of trust,  
4 substitution of the trustee, and other alleged violations of the pre-foreclosure procedures. “[A]n  
5 action to set aside a trustee's sale for irregularities in sale notice or procedure should be  
6 accompanied by an offer to pay the full amount of the debt for which the property was security.”  
7 *Karlsen v. Am. Sav. & Loan Assn.*, 15 Cal. App. 3d 112, 117 (1971) (defaulting borrower’s  
8 action). In case of a voidable trustee’s sale, the defaulting borrower has a right to redeem the  
9 property. *Id.* at 121. When the borrower “fails to effectively exercise [the] right to redeem, the  
10 sale becomes valid and proper in every respect.” *Id.* A cause of action “implicitly integrated”  
11 with the irregular sale also fails, unless the defaulting borrower can allege and establish a valid  
12 tender. *Id.*

13 All of Plaintiff’s causes of action depend on the alleged invalid sale and are therefore  
14 “implicitly integrated” with it. Plaintiff did not allege that she made the requisite tender.  
15 Instead, she contends that she is excepted from the requirement.

16 Citing *Dimock v. Emerald Properties LLC*, 81 Cal. App. 4th 868 (2000), she argues that  
17 the tender rule does not apply to her because she did not allege that the sale was merely  
18 voidable, but void. In *Dimock* the trustee’s sale was found void because it was conducted by the  
19 original trustee although the original trustee had been substituted with a new trustee prior to the  
20 sale. 81 Cal. App. 4th at 874. Recording of the substitution of the trustee was required by law to  
21 render it effective. *Id.* at 874-75 citing Cal. Civ. Code § 2934a. Therefore, on the face of the  
22 recorded documents, the original trustee had been replaced and no longer had the power to sell.  
23 For this reason, the sale was held void as opposed to merely voidable, the presumption of the  
24 validity of the trustee’s sale did not apply, and the plaintiff was not required to tender any  
25 amounts owing under the deed of trust to obtain relief. *Id.* at 877-78.

26 Plaintiff’s case is different. The trustee substitution was recorded prior to the sale and the  
27 sale was conducted by the successor trustee. (First Am. Compl. Exh. E (Substitution of Trustee  
28 recorded Aug. 6, 2009) & Exh. H (Trustee’s Deed Upon Sale showing sale conducted by

1 successor trustee on June 7, 2010).) The recorded documents therefore reflect that Trustee  
2 Corps was the successor trustee who conducted the sale. Unlike the plaintiff in *Dimock*, Plaintiff  
3 admits that “the Trustee’s Deed (Exhibit “H”) appears valid on its face.” (First Am. Compl. at  
4 20.)

5 Instead, Plaintiff’s theory of the defect in the substitution of the trustee is that it was not  
6 recorded prior to recording the notice of default. (First Am. Compl. at 12-13, Exh. C (Notice of  
7 Default and Election to Sell Under the Deed of Trust, recorded Apr. 24, 2009) & Exh. E  
8 (Substitution of Trustee, recorded Aug. 6, 2009).) She points to no legal authority to show that  
9 this was required for a substitution of the trustee or a non-judicial foreclosure sale to be valid, or  
10 that failure to comply with any such requirement would render the trustee’s sale void as opposed  
11 to merely voidable. *Dimock* therefore does not support Plaintiff’s argument that the tender rule  
12 does not apply to her.

13 Plaintiff also relies on *Munger v. Moore*, 11 Cal. App. 3d 1 (1970), for the proposition  
14 that no tender is required when there was an improper trustee’s sale which is being challenged  
15 after the fact. *Munger* presented a situation where the owner of the encumbered property made a  
16 proper tender to bring the defaulted loan current, but the trustee wrongfully refused the tender  
17 and sold the property to the lenders. 11 Cal. App. 3d at 5-6. The lenders later sold the property  
18 to a third party. *Id.* at 6. After trial the plaintiff was awarded tort damages for wrongful  
19 foreclosure in the amount of the equity in the property at the time of the foreclosure sale. *Id.* at  
20 5. The only issues decided on appeal were the proper measure of damages and whether the  
21 evidence to support the amount was sufficient. *Id.* The court expressly distinguished the case  
22 from the “traditional method” of attacking a trustee’s sale – by a suit in equity to set aside the  
23 foreclosure. *Id.* *Munger* does not help Plaintiff in circumventing the tender rule. First, unlike in  
24 Plaintiff’s case, the plaintiff in *Munger* made a proper tender. Second, unlike Plaintiff here, who  
25 is using the “traditional method” to challenge the trustee’s sale, the plaintiff in *Munger* sought  
26 tort damages.

27 The only other binding authority cited by Plaintiff is *Onofrio v. Rice*, 55 Cal. App. 4th  
28 413 (1997). She argues that tender should not be required in her case because it would be

1 inequitable. *See id.* at 424. In *Onofrio*, tender was not required under the circumstances where  
2 the person who purchased the plaintiff's property at foreclosure was her own foreclosure  
3 consultant who represented that he would assist her in avoiding foreclosure. Plaintiff has alleged  
4 no similar or similarly egregious facts here.

5 Finally, although it is undisputed that Plaintiff did not allege tender in her operative  
6 complaint, she argues in her opposition papers that she meets the tender requirement because she  
7 has asserted damage claims against Defendants, which would be offset against any amount she  
8 owes on the property. "[W]hen the person making the claim has a counterclaim or set-off  
9 against the beneficiary, whether liquidated or unliquidated, it is deemed that the tender and  
10 counter-claim offset each other, and if the offset is equal to or greater than the amount due, a  
11 tender is not required; otherwise the amount of the tender is reduced by the amount of the  
12 offset." 4 Miller & Starr Cal. Real Estate 3d §10:212 (2011) ("Miller & Starr"); *see also*  
13 *Onofrio*, 55 Cal. App. 4th at 424. This principle does not assist Plaintiff's case in its present  
14 posture.

15 The offset theory of tender is not alleged in the operative complaint. Plaintiff is required  
16 to allege tender. *Abdallah v. United Savings Bank*, 43 Cal. App. 4th 1101, 1109 (1996).  
17 "Without an allegation of . . . tender in the complaint that attacks the validity of the sale, the  
18 complaint does not state a cause of action." 4 Miller & Starr §10:212. Defendants motions to  
19 dismiss are therefore **GRANTED**.

20 In the alternative, the motions are granted because "[a] tender must be one of full  
21 performance and must be unconditional to be valid." *Arnolds Management Corp. v. Eischen*,  
22 158 Cal. App. 3d 575, 580 (1984) citing Cal. Civ. Code §§ 1486 & 1494. "The rules which  
23 govern tenders are strict and are strictly applied." *Nguyen v. Calhoun*, 105 Cal. App. 4th 428,  
24 439 (2003). "The tenderer must do and offer everything that is necessary on his part to complete  
25 the transaction, and must fairly make known his purpose without ambiguity, and the act of tender  
26 must be such that it needs only acceptance by the one to whom it is made to complete the  
27 transaction." *Gaffney v. Downey Savings & Loan Assn.*, 200 Cal. App. 3d 1154, 1165 (1988)  
28 (partial payment of no effect) (internal quotation marks omitted). The defaulted borrower bears

1 the “responsibility to make an unambiguous tender of the entire amount due or else suffer the  
 2 consequence that the tender is of no effect.” *Id.* Plaintiff does not offer any facts to indicate that  
 3 she was not required to tender anything because her claimed offset is equal to or greater than the  
 4 amount due so as to excuse it altogether.

5 Plaintiff requested leave to amend if Defendants’ motion are granted. Rule 15 advises the  
 6 court that leave to amend shall be freely given when justice so requires. Fed. R. Civ. P. 15(a).  
 7 “This policy is to be applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*,  
 8 316 F.3d 1048, 1051 (9th Cir. 2003) (internal quotation marks and citation omitted).


9 In the absence of any apparent or declared reason -- such as undue delay, bad faith  
 10 or dilatory motive on the part of the movant, repeated failure to cure deficiencies  
 11 by amendments previously allowed, undue prejudice to the opposing party by  
 virtue of allowance of the amendment, futility of amendment, etc. -- the leave  
 sought should, as the rules require, be “freely given.”

12 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Dismissal with prejudice and without leave to  
 13 amend is not appropriate unless it is clear that the complaint could not be saved by amendment.  
 14 *Id.* Because Plaintiff may possibly allege sufficient facts regarding tender, and adequately  
 15 address other issues raised in Defendants’ motions, her request for leave to amend is granted.

16 Based on the foregoing, Defendants’ motions to dismiss are **GRANTED** with **LEAVE**  
 17 **TO AMEND**. No later than **September 12, 2011** Plaintiff must file either (1) a second amended  
 18 complaint alleging additional facts regarding tender and facts addressing other issues raised in  
 19 Defendants’ motions to dismiss; or (2) a notice of election not to file an amended complaint.  
 20 Failure to comply with this order will result in dismissal of the action pursuant to Federal Rule  
 21 of Civil Procedure 41(b). Defendants’ responses to the second amended complaint, if any, must  
 22 be filed and served within the time set forth in Federal Rule of Civil Procedure 15(a)(3).

23 **IT IS SO ORDERED.**

24  
 25 DATED: August 17, 2011

26   
 27 M. James Lorenz  
 28 United States District Court Judge

1 COPY TO:

2 HON. WILLIAM McCURINE, Jr.  
3 UNITED STATES MAGISTRATE JUDGE

4 ALL PARTIES/COUNSEL  
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